IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MICHELLE DEULEY, Individually, and in her Capacities as Surviving Spouse of John Deuley, As Executrix of the Estate of John Deuley, Deceased, And as Mother, Guardian and/or Next Friend of Amberlye Marie Deuley, Justin Andrew Deuley, and Jordan Aubrey Deuley, Minor Children of John Deuley; JOSEPH AND KIM DICKINSON; KATHY GIBSON, Individually, and in her Capacities as Surviving Spouse of Gerald Gibson and as Executrix of the Estate of Gerald Gibson, Deceased, Plaintiffs,	)	
v.	)	C.A. No.: 06C-08-188 FSS
	)	**E-FILED**
DYNCORP INTERNATIONAL, INCORPORATED, a Delaware Corporation, Parent of the co-defendant DYNCORP entities, formerly known as DI Acquisition Corp; DYNCORP INTERNATIONAL LLC, a Delaware Limited Liability Corporation; and CSC APPLIED TECHNOLOGIES LLC, formerly known as Dyncorp Technical Services, LLC, a Delaware Limited Liability Corporation, Defendants.	)	

Submitted: November 17, 2009
Decided: February 26, 2010

MEMORANDUM OPINION AND ORDER

Upon Defendants' Motion to Dismiss -
***GRANTED*.**

SILVERMAN, J.

The facts and issues presented here are similar to those in the related case, *Parlin v. DynCorp International, Inc.*[1] In summary, *Parlin* recently held that, by signing an employment agreement containing a general release, Parlin contractually waived his estate's survival claim, but not his family's wrongful death claim. The key issue left undecided was whether, for tort purposes, the release also amounted to primary or, as it is also called, express assumption of the risk. If Plaintiffs agreed to assume the risk, Defendants have a complete defense to Plaintiffs' tort claims, and, therefore, a complete defense to their next-of-kin's wrongful death claims. Now, the court must decide if the contractual release that waived the releaser's survival claim was also an agreement to assume the risk for tort purposes.

I.

On August 29, 2004, John Deuley and Gerald Gibson were killed, and Joseph Dickinson was seriously injured, by Al Qaeda in Kabul, Afghanistan. The three men worked on a United States Department of State Civilian Police (CIVPOL) mission "to assist the Government of Afghanistan with the development of a democratic police force capable of enforcing the rule of law." Deuley, Gibson, and Dickinson were stationed at headquarters, called "DynHouse," when it was attacked by a vehicle-borne improvised explosive device. Plaintiffs describe DynHouse as "a

[1]2009 WL 3636756 (Del. Super. Sept. 30, 2009) (Silverman, J.).

highly symbolic target for Al Qaeda that was formerly used by Osama Bin Laden[.]"

Plaintiffs allege that Deuley and Dickinson "repeatedly warned, in writing and in person, defendants . . . of the insecure nature of DynHouse[,]" but that "[e]ach time, defendants rebuffed the recommendations and chose the less secure option, which was usually to allow DynHouse to remain insecure[.]" Plaintiffs further state:

> On August 28, 2004, the International Security Assistance Force . . . based in Kabul, which was organized by the United Nations and commanded by the North Atlantic Treaty Organization, issued a warning for an attack on coalition targets in downtown Kabul over the next 48 hours utilizing either a Body-Borne or Vehicle-Borne Improvised Explosive Device. Defendants received this warning[.]
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> . . . .
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> [D]ecedent Deuley and plaintiff Joseph Dickinson cancelled all unnecessary movements and alerted the foreign guards and all employees of the possibility of an attack.
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> Despite the substantial certainty of an imminent attack on a symbolic coalition target lacking basic building security measures, defendants . . . still did not allow the security employees to take even minimal measures to protect DynHouse, including closing the adjacent street and/or deploying vehicle barricades.
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> . . . .
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> On August 29, 2004, within 24 hours of the ISAF warning, an Al Qaeda operative detonated a VBIED immediately adjacent to the entrance to DynHouse, severely injuring plaintiff Joseph Dickinson and severely injuring and killing John Deuley and Gerald Gibson.

Defendants, DynCorp International, Inc., DynCorp International LLC,

and CSC Applied Technologies LLC, were the general contractors to the CIVPOL mission. Defendants managed employee housing, logistical support, and supervision. DynCorp International, Inc. is a Delaware corporation with its principal place of business in Reston, Virginia. DynCorp International LLC is also a Delaware corporation with its principal place of business in Fort Worth, Texas. CSC Applied Technologies LLC is a Delaware limited liability corporation that maintains an office in New Castle, Delaware.

Defendants had subcontracted with non-party, DynCorp International FZ-LLC, a Dubai corporation, to hire personnel and provide services under the CIVPOL contract. DynCorp International FZ-LLC was Deuley's, Gibson's, and Dickinson's employer at the time of the Kabul explosion.

Deuley, Gibson, and Dickinson signed employment agreements with DynCorp International FZ-LLC, on February 13, 2004, June 26, 2004, and December 11, 2003, respectively, stating:

> The Employee understands and accepts the fact that he . . . may be exposed to dangers due to the nature of the mission. The Employee agrees that neither Employer nor its affiliates will be liable in the event of death, injury, or disability to Employee, except as stated below. Employer will obtain . . . insurance . . . on behalf of the Employee. The Employee agrees to accept these insurance benefits as full satisfaction of any claim for death, injury or disability against Employer and its affiliates.

The agreements also contain a choice of law provision, stating: "This contract shall be governed by and interpreted under the laws of the Dubai Internet City in the Dubai Technology, Electronic Commerce and Media City Free Zone."

In accordance with the agreements, insurance was purchased for Deuley, Gibson, and Dickinson. Upon their deaths, Deuley's and Gibson's beneficiaries received $160,000.00 under the policies. For his injuries, which include loss of hearing and impairment to his left leg, Dickinson receives disability benefits of $1,030.78 per week, and will receive paid-for medical treatment until his doctor releases him to return to work or he reaches his maximum medical improvement.

II.

On August 22, 2006, Deuley's wife, Michelle, and Gibson's wife, Kathy, filed wrongful death[2] and survival[3] actions against Defendants. Additionally, Dickinson filed a personal injury claim, and his wife, Kim, sued for "loss of her husband's society, comfort, companionship, and consortium." Plaintiffs joined in one action under Superior Court Civil Rule 20.[4]

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[2] 10 *Del. C.* §§ 3721-22, 3724-25.

[3] 10 *Del. C.* §§ 3701, 3704.

[4] *See* Super. Ct. Civ. R. 20(a) ("All persons may join in one action as plaintiffs if they assert any right to relief . . . arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.").

On September 27, 2006, Defendants filed a notice of removal in the United States District Court for the District of Delaware. The District Court subsequently granted Plaintiffs' motion for remand, and the case returned to this court.[5] On February 13, 2009, Defendants filed a motion to dismiss under Superior Court Civil Rule 12(b)(6).[6]

III.

A case may be dismissed, under Rule 12(b)(6), for failure to state a claim upon which relief can be granted. The court must accept all well-pleaded allegations as true, and "[t]he test for sufficiency is . . . whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint. If [plaintiff] may recover, the motion must be denied."[7]

If, on a 12(b)(6) motion to dismiss, "matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]"[8] In that instance, "all parties shall be given reasonable opportunity to present all material made pertinent

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[5] *Deuley v. DynCorp Int'l, Inc.*, 588 F. Supp. 2d 539 (D. Del. 2008).

[6] As it happened, this case and *Parlin* were assigned to different judges. Eventually, the court decided it would be efficient to assign the cases to one judge, so this case was reassigned on November 17, 2009.

[7] *Parlin*, 2009 WL 3636756, at *1 (quoting *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

[8] *Id.* at *2 (quoting Super. Ct. Civ. R. 12(b)(6)).

to such a motion by Rule 56."[9]

In limited circumstances, however, "it may be proper for a trial court to decide a motion to dismiss by considering documents referred to in a complaint."[10] "The exception has been used in cases in which the document is integral to a plaintiff's claim and incorporated in the complaint[.]"[11]

Plaintiffs' claims stem from events that took place while decedents and Dickinson were working in Afghanistan. Because the employment agreements are integral to Plaintiffs' claims, they will be incorporated by reference, without converting the motion to dismiss into one for summary judgment.[12]

Additionally, under Superior Court Civil Rule 44.1, "[t]he Court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Delaware Rules of Evidence. The Court's determination shall be treated as a ruling on a question of law."[13] Generally, "the movant will submit enough 'relevant material' to

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[9] *Id.*

[10] *Id.* (quoting *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006)).

[11] *Id.* (quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995)).

[12] *Id.*

[13] *Id.* (quoting Super. Ct. Civ. R. 44.1).

the Court to sufficiently establish the content of foreign law."[14]

Because the foreign law issue, by definition, presents a question of law, the court's consideration of foreign law materials will not convert the motion to dismiss into one for summary judgment. Under Rule 44.1, the court may consider any relevant material, which here includes legal experts' submissions. As explained below, however, the decision does not turn on foreign law because the result is the same under both Delaware and Dubai law.

IV.

Parlin holds that the general release there, which is identical to the one here, was valid under Delaware, Dubai, and United Arab Emirates law.[15] By signing the employment agreement containing the release, Parlin waived his estate's survival claim, thus barring his estate from pursuing it.[16] Parlin's signing the general release, however, did not extinguish his family's wrongful death claim.[17] Accordingly, for the same reasons provided in *Parlin*, Deuley's and Gibson's estates are barred from pursuing survival claims, but not from pursuing wrongful death claims. Here, unlike

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[14] *Id.* (quoting *Republic of Panama v. Am. Tobacco Co.*, 2006 WL 1933740, at *5 (Del. Super. June 23, 2006) (Cooch, J.)).

[15] *Id.* at *3.

[16] *Id.* at *5.

[17] *Id.* at *6.

Parlin, there is also Dickinson's personal injury claim and his wife's loss of consortium claim.

As *Parlin* explains, *Jones v. Elliott*[18] holds that a "physically injured spouse may not unilaterally extinguish the loss of consortium claim of the other spouse by signing a general release, for the loss of consortium claim is not his to extinguish."[19] Accordingly, like Jones, Dickinson waived his personal injury claim by signing the employment agreement containing the release, but not his wife's loss of consortium claim. The agreement did not purport to release any claims besides Dickinson's, and Kim Dickinson did not sign the agreement or a release. Of course, Kim Dickinson still must "prove the underlying liability of the tortfeasor for the husband's physical injury."[20] As discussed below, that is not reasonably possible.

Parlin also observes that under Dubai law, the release does not apply to the employees' spouses, as they did not sign releases and the releases contain no reference to the employees' heirs. Additionally, under the UAE Civil Code, nothing

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[18]551 A.2d 62 (Del. 1988).

[19]*Id.* at 64-65 ("This is a claim for a separate and distinct injury resulting from the physical injury to the husband and may be maintained independently if . . . the spouse having the direct claim has unilaterally foreclosed the opportunity to assert the consortium claim.").

[20]*Id.* at 65.

indicates that the release extended to the employees' families.[21]

V.

Here, Defendants squarely invoke assumption of the risk as a ground for dismissal. They contend that "[t]he Officers' primary assumption of the risk, along with the valid general release, is a complete bar to recovery." As presented above, Plaintiffs signed employment agreements, stating: "[t]he Employee understands and accepts the fact that he or she will be exposed to dangers due to the nature of the mission." And, the agreements refer to injury and death. Defendants claim that "there can be no dispute that each Officer fully appreciated the risks involved in working in war-torn Afghanistan."

In response, Plaintiffs argue that their "claims do not arise from 'the risk of their profession' but from defendant's negligence and recklessness, which is analyzed differently from more generalized risks." Plaintiffs claim that "[w]hile decedent may have arguably assumed a generalized risk of attack in Afghanistan, there has been no showing (or argument) that decedent assumed the risk of defendants' negligence or recklessness."

Plaintiffs' argument to the contrary notwithstanding, if the releases

[21]UAE Civil Code Art. 250 (quoted in Legal Op. of Hassan Arab, at 8) ("The effects of the contract shall extend to the contracting parties and their general successors . . . unless it appears from the contract or from the nature of the transaction or from the provisions of the law that the effects were not to extend to a general successor.").

amounted to express agreements to assume the risk, by definition, Plaintiffs relieved Defendants of any duty of care. That means Plaintiffs cannot hold Defendants liable for conduct that would otherwise be negligent or reckless.[22]

Accordingly, for purposes of Defendants' motions to dismiss, the court must decide whether the complaint, giving Plaintiffs every reasonable inference, states a claim for wrongful death. Of course, as explained above, that analysis turns on whether it appears from the complaint itself that Plaintiffs undeniably and expressly agreed to assume the risk of IED attack.

Plaintiffs do not deny they knew they were going to work for Defendants in a war zone. The court takes notice that, at a minimum, when Plaintiffs signed the releases, even a poorly informed American had to have appreciated that working in Afghanistan involved the general risk of insurgent or terrorist attacking by an IED. The complaint offers no reason to find that any plaintiff here was probably unaware of the general risk of being injured or killed by a bomb.[23]

While details about Plaintiffs' specific duties are not included in the complaint, it appears that Plaintiffs' mission was training police officers in

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[22]Restatement (Second) of Torts § 496B (1965); *Spencer v. Wal-Mart Stores E., LP*, 930 A.2d 881, 885 (Del. 2007).

[23]*Sewell v. Dixie Region Sports Car Club of Am., Inc.*, 451 S.E.2d 489, 490 (Ga. App. 1994) ("[I]n the absence of anything to the contrary, every adult is presumed to possess such ordinary intelligence, judgment, and discretion as will enable him to appreciate obvious danger.").

Afghanistan. As presented above, Plaintiffs allege that "DynHouse" was a special target for just the sort of attack they encountered there. Plaintiffs further claim that they actually warned Defendants about the peril, and they complain that their concerns were ignored or dismissed. Thus, Plaintiffs cannot deny that they went to Afghanistan knowing generally of the risk of the harm that befell them. And, while in Afghanistan, their knowledge of the threat became specific.

To refute primary assumption of the risk, Plaintiffs do not suggest that they were unaware that they were going to a place where they might encounter an IED. They attempt to refute their primary assumption of the risk by contending that Defendants were specifically warned that an attack was imminent, but Defendants negligently or recklessly "rejected the use of any additional security measures or changes in procedure[.]" Accordingly, for present purposes, the court assumes that Defendants were negligent, or even reckless, by rejecting additional security measures or changes in procedure, as alleged. That assumption, however, does not overcome Plaintiffs' primary assumption of the risk.

When they signed the releases, Plaintiffs may not have known precisely how they might be injured or killed by an IED – through direct enemy action, Defendants' negligence, or a combination, or otherwise – but they undeniably knew that terrorist insurgents in Afghanistan were planting bombs in order to kill

Americans.[24] Based on their pleadings and common experience, Plaintiffs cannot deny that they knew they were risking death or injury from IEDs when they signed the releases in return for Defendants agreeing to buy insurance for them and their families.

The court will not hold, as a matter of law, that assuming the risk of going into harm's way only embraces enemy action, and not also the confusion, mis-communication, mistakes and even stupidity associated with war that leads to injury and death. The court holds, as a matter of law, that the "dangers due to the nature of the mission," which Plaintiffs expressly agreed to assume, included everything involving IEDs.

VI.

Having decided that Plaintiffs expressly assumed the risk of the harm that caused their deaths, the court must finally consider whether that knocks out the wrongful death claims. As explained in *Parlin* and above, it is settled that wrongful death claims are derivative. Unless the decedent was subject to a tort, the next-of-kin cannot maintain wrongful death claims. By agreeing to assume the risk of the harm

[24] *Slowe v. Pike Creek Court Club, Inc.*, 2008 WL 5115035, at *4 n.22 (Del. Super. Dec. 4, 2008) (Ableman, J.) (quoting *McDonough v. Nat'l Off-Road Bicycle Ass'n*, 1997 WL 309503, at *5 (D. Del. June 2, 1997)) ("In an express agreement to assume a risk, a plaintiff may undertake to assume all risks of a particular situation, whether they are known or unknown to him."); *see also Madison v. Superior Court (Sulejmanagic)*, 250 Cal. Rptr. 299, 306 (Cal. Ct. App. 1988) ("[B]y express agreement a 'plaintiff may undertake to assume all of the risks of a particular . . . situation, whether they are known or unknown to him.'").

that ultimately caused their deaths, Plaintiffs gave Defendants a complete defense. Defendants owed Plaintiffs no duty of care as to the assumed risk.[25] It follows that the survivors cannot impose liability on Defendants where Defendants had no liability to the decedents. The same is true for the loss of consortium claim.

The cases on the relationship between a decedent's primary assumption of the risk and his survivor's wrongful death claim are scant. There is, however, a helpful opinion from California. In *Madison v. Superior Court (Sulejmanagic)*[26], decedent signed a waiver and release in favor of the providers of a scuba diving training course. Decedent died because of the providers' presumptive negligence. *Madison* held that the release could not limit the survivors' right to prosecute their wrongful death action, but the decedent assumed the risk of injury and thereby relieved the providers of any duty to him. Accordingly, the providers had a complete defense to the decedent's tort claim, and that extinguished his survivors' wrongful death claim.

Madison is also helpful because it examined the quality of the waiver and release there. The waiver and release in *Madison* was more explicit than the ones signed by Plaintiffs here. The waiver and release in *Madison* boldly stated that it

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[25] *Koutoufaris v. Dick*, 604 A.2d 390, 397 (Del. 1992) (explaining that primary assumption of risk "relieves the defendant from all legal duty").

[26] 250 Cal. Rptr. 299 (Cal. Ct. App. 1988).

covered "liability for personal injury, . . . or wrongful death caused by negligence."[27] Whereas, the waiver and release here speaks of injury or death associated with the dangers of the mission. *Madison*, however, did not turn on the waiver and release's specificity. It turned on what it was that the decedent waived.

The pivotal issue there was whether the decedent "clearly accepted responsibility for the consequences of any act of negligence by defendants."[28] Because the appellate court in *Madison* was satisfied that decedent accepted responsibility, it concluded that whether decedent knew the specifics about the risk of harm was "irrelevant."[29] *Madison* held where decedent assumed all risk, "the law imposes no requirement that [decedent] have had a specific knowledge of the particular risk which resulted in his death."[30]

Here, decedents accepted responsibility for all risks of injury and death associated with the dangers of their mission in Afghanistan, including the threat of IEDs. Decedents were killed by an IED. Accordingly, the particulars about what lead up to the fatal explosion cannot give rise to a claim.

In closing, the court acknowledges that it is unusual to grant dismissal

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[27] *Id.* at 302.

[28] *Id.* at 306.

[29] *Id.* at 306-07.

[30] *Id.* at 306.

in a tort case. Even so, discovery cannot materially improve Plaintiffs' position here. The court has assumed that Defendants' negligence was a proximate cause of Plaintiffs' injuries and deaths. Plaintiffs failure to state a claim turns on the contracts that the decedents and Dickinson signed. Even when those contracts are viewed in the context set-out in the complaint, they unassailably reflect assumption of the risk of injury and death from an IED. Thus, as explained above, as a matter of law, Defendants cannot be held liable in tort for the decedents' injuries and deaths.

VII.

For the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED.**

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
Robert K. Beste, III, Esquire
Neilli Mullen Walsh, Esquire